91-2028

(2)

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

BRENDA JONES, Individually and
As Administratrix of the
Estate of EVAN A.M. JONES, Deceased,

Petitioner,

vs.

PETTY-RAY GEOPHYSICAL, DIVISION OF
GEOSOURCE, INC., GEOSOURCE, INC., AND
MARATHON PETROLEUM SUDAN, LTD.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR MARATHON PETROLEUM SUDAN, LTD. IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals properly dismissed Petitioner's appeal for want of prosecution for failure to file her brief in a timely manner.

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OPINIONS BELOW

The Order dismissing appeal is reproduced at Pet. App. 1a.

JURISDICTION

The Order dismissing Petitioner's appeal in the United States Court of Appeals for the Fifth Circuit was

entered November 27, 1991. Pet. App. 1a. The Order denying Motion to Reinstate Appeal was entered January 8, 1992. Pet. App. 5a. Petition for Panel Rehearing was denied on February 6, 1992. Pet. App. 6a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Local Rule 42.3.2 of the United States Court of Appeals for the Fifth Circuit reads as follows:

42.3 Dismissal for Failure to Prosecute

> 42.3.2 In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the court, the clerk shall enter an order dismissing the appeal for want of prosecution.

5th Cir. R. 42.3.2.

The rule cited by Petitioner, 5th Cir. R. 42.3.1, at Pet. 2-3, concerns direct criminal appeals, *habeas* cases, and cases filed pursuant to 28 U.S.C. § 2255. It does not concern suits for civil damages such as the one at issue.

STATEMENT OF THE CASE

This is an appeal from a dismissal of Petitioner Brenda Jones' ("Jones" or "Petitioner") appeal for failure to file her brief pursuant to Fed. R. App. P. 31 and 5th Cir. R. 42.3.2. Rule 42.3.2. instructs the clerk to enter an order dismissing an appeal for want of prosecution when a

party fails to file his brief within the time allowed. Petitioner argues that the court abused its discretion in dismissing her appeal because one of her two attorneys of record did not receive notice of the briefing deadlines.

The record reveals that Jones' counsel of record, James Scherr ("Scherr"), received actual notice of the due date for Appellant's brief. Pet. App. 10a-11a. That notice also included the Fifth Circuit's policy regarding extensions of time for filing briefs and specified that Rule 42.3.2 allows the clerk to dismiss appeals without notice if the appellant's brief is not filed timely. Through negligence or indifference, Jones' counsel never filed a brief, and the court of appeals correctly dismissed the appeal.

The record reveals that Scherr, rather than Roberts, acted as Jones' appellate counsel. Scherr filed a Notice of Appeal for Jones on April 30, 1991. Scherr later sent a letter dated May 10, 1991, to the clerk of the Fifth Circuit transmitting a certified copy of the Notice of Appeal. On May 14, 1991, Scherr completed a transcript order form to the clerk of the Fifth Circuit and to the clerk of the Southern District of Texas. Also, on May 14, 1991, Scherr mailed a letter to Ms. Janice Helstrom and Ms. Mary Hagbee, court reporters for the district court, requesting preparation of a transcript and a statement of facts. These two individuals received additional letters from Scherr concerning the transcript on May 23, 1991. Letters from Scherr dated June 4, 1991, enclosed a copy of the original Transcript Order to the clerk of the Fifth Circuit. The Appellant filed her Praecipe on June 11, 1991, by Scherr. Although Jones asserts that Scherr acted only as her "trial" counsel, the record reveals otherwise.

On October 1, 1991, the clerk of the Fifth Circuit sent a notice to Scherr, with copies to counsel for appellees, notifying the parties of the briefing schedule. Pet. App. 10a-11a. The notice stated that Appellant's brief and record excerpts were due forty days from October 1. The clerk also specified that he could not send the record on appeal until Scherr filed an Appearance of Counsel form. In addition, the clerk provided notice to Scherr that Rule 42.3.2 allows the clerk to dismiss appeals without notice if the Appellant's brief is not filed timely. The notice also stated that failure to have access to the record would not be considered grounds for extending the time to file Appellant's brief.

An Appearance of Counsel form designating Mr. Charles Louis Roberts *and* Scherr as counsel for Appellant was filed on October 4, 1991. Roberts' telephone number and Social Security number were omitted from the form. Scherr's telephone number and Social Security number were provided. Jones does not allege that Scherr failed to receive the October 1, 1991, briefing notice or that he was unaware of the briefing schedule. The only allegation of lack of notice concerns Scherr's co-counsel, Roberts.

By way of proving that Roberts was her "appellate" counsel, Jones asserts that Roberts sent a letter to the clerk requesting the record. There is no evidence of this request in the court of appeals' records. Even if there were, Roberts had not entered an appearance prior to the notice of the briefing schedule sent by the clerk on October 1, 1991, and the clerk was under no obligation to send the record to anyone who had failed to file an Appearance of Counsel.

After October 4, 1991, neither Scherr nor Roberts ever communicated with the court. Although Jones alleges Roberts was waiting for the record, there is no record of any effort by Jones to determine why the record had not been mailed. This indifference on Roberts' part resulted in the failure to file a brief on November 11, 1991. Further, the October 1, 1991, briefing notice from the clerk of the Fifth Circuit to Jones specified (in bold type) that failure to have access to the record will not be considered grounds for extending the time to file the Appellant's brief.

On November 27, 1991, the clerk of the United States Court of Appeals for the Fifth Circuit entered a dismissal of the appeal for want of prosecution pursuant to 5th Cir. R. 42.3.2. A Motion to Reinstate, a Petition for Rehearing *En Banc* and a Motion for Rehearing were all denied. Pet. App. 5a-9a.

ARGUMENT

1. Marathon acknowledges that this Court has clear supervisory authority and responsibility over the inferior federal courts and may decide the propriety of the local rules of the courts of appeal. *Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607, 96 L.Ed. 557 (1987). This case does not warrant the Court's granting certiorari because Fifth Circuit rule 42.3.2 is justified by jurisprudential considerations of dismissing an appeal where the appellate rules have not been observed.

The principal of consistent and mutual respect for the supremacy of rules in our system of law counsels for

sanctions against a participant who fails to abide by those rules without good cause. In *Kushner v. Winterthur Swiss Insurance Co.*, 620 F.2d 404 (3rd Cir. 1980), the court stated:

> Each appellant in this court must of necessity allege that the district court violated some rule of substantive or procedural law . . . the litigant, then, who charges that the rules were not followed in the district court should himself follow the rules when he applies for relief in this court. Sauce for the goose is sauce for the gander.

Winterthur, 620 F.2d at 407.

Clearly, jurisprudential considerations support the court of appeals' use of its local rules to sanction litigants who fail to observe its rules.

2. Petitioner claims that there is a conflict among the circuits concerning dismissal of appeals for failure to comply with federal and local rules. Pet. 9-12. This is not true. Rule 31 of the Federal Rules of Appellate Procedure provides that the appellant shall file a brief within forty days after the date that the record is filed. Failure to file a brief on time is not a jurisdictional bar to hearing the appeal. *Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978). However, failure to file a brief on time may provide the cause for summary disposition of the appeal in *the court's discretion*.

In addition, the Fifth Circuit's rules provide sanctions for a party's failure to adhere to the Federal Rules of Appellate Procedure. Other circuits provide similar local rules. *See*, 3rd Cir. R. 21(4), *Matute v. Procoast Navigation, Ltd.*, 928 F.2d 627 (3rd Cir. 1991). All circuits agree that

the decision to dismiss an appeal is discretionary. *Stotler & Co. v. Able*, 837 F.2d 1425 (7th Cir. 1988); *Barber v. American Security Bank*, 841 F.2d 1159 (D.C. Cir. 1988); *In Re: Beverly Manufacturing Corp.*, 778 F.2d 666 (11th Cir. 1985). Such circuit court rules are designed to enable appellate courts to process effectively and judiciously an ever-increasing workload. As the decisions in the more recent cases indicate, the number of appeals filed per judge has swelled dramatically. Thus, the pragmatic considerations that motivated the court of appeals' dismissal of the appeal are even more compelling in 1992. The court of appeals efforts to provide speedy and just dispositions of appeals for every litigant are hindered by a party that fails to abide by the court's rules for the timely filing of briefs.

Although dismissal of an appeal may not be appropriate in every case of an untimely filing, there was no showing in this case of "extraordinary and compelling circumstances" that could have given the court cause to excuse the violation. *Barber v. American Security Bank*, 841 F.2d 1159, 1160 (D.C. Cir. 1988). Here, Petitioner's counsel of record received notice of the briefing deadline and offered no explanation for his failure to comply. The excuse that Petitioner's "appellate" counsel (Roberts) had not received the October 1 notice to Scherr is disingenuous because Scherr and Roberts were co-counsel, and Roberts did not become a designated co-counsel until after the briefing notice had been delivered to Scherr. Even under Petitioner's characterization of the record, Scherr was counsel of record during the entire period of the case and was therefore obligated to file his client's

brief in a timely manner. No excuse is offered for Scherr's failure.

The notice of the brief due date was delivered to Jones' counsel, Scherr, in the October 1, 1991, briefing notice. The clerk of the court of appeals fulfilled his obligation to inform counsel of record (and the counsel who had filed the Notice of Appeal) that the brief was due on November 11, 1991. The clerk also used the briefing notice to inform Jones that failure to comply with the briefing schedule was cause for dismissal under Rule 42.3.2. Jones offered no explanation to the Fifth Circuit for her counsel's failure to comply with the court's rules. The court of appeals correctly dismissed Petitioner's appeal for Petitioner's failure to file her brief on time, or to provide any credible excuse for her failure.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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June 10, 1992